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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 454.

SOCONY MOBIL OIL COMPANY, INC., SOCIETE ALGERIENNE DES PETROLES MORY, AND TEXACO, INC.,

Petitioners,

against

WALL STREET TRADERS, INC., *et al.*,

Respondents.

RESPONDENTS' OPPOSING BRIEF.

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RESPONDENTS' OPPOSING BRIEF.

Statement.

Petitioners have submitted a brief singularly devoid of any ground which makes this case appropriate for review under Rule 19 of this Court.

The "Statement" in the Petition, completely lacking in reference to the record, consists largely of a characterization of the "facts", composed of charges that emerged first in belated briefs to the Appellate Court. It is at variance with the factual situation determined by the Commissioner, and subsequently affirmed by both the District Court and the Court of Appeals.

The facts are available in concise form in the opinion of Judge BROWN, in this case, reported sub nom *Barnouw v. SS. Ozark* (hereinafter *The Ozark*) 304 F. 2d 717, 720-21 (5 Cir., 1962). Judge BROWN noted that in 1957 the shipowner gave a half million dollar preferred ship mortgage.

This was assigned in 1958, for the full face amount, to WALL STREET, at which time a supplemental agreement was recorded, extending the maturity to July 1959. In Spring of 1959, as noted in the Petition (p. 3), various supplies were furnished by Petitioners SOCONY ($12,002), TEXACO ($7,214), and MORY ($18,804) (Record, Folder No. 4, Document 83, Final Decree, June 26, 1961, item 6, p. 3). The Suppliers appeared to be more than liberal in their credit extensions, the record disclosing no effort in collection until their lawsuits in 1962.

In June 1959 the unpaid balance of the mortgage debt, $360,000, was renegotiated by a further extension of six months in the maturity date. Negotiable bonds were given to WALL STREET, and the mortgage was given to WALL STREET'S trustees, Barnouw and Murnan (*The Ozark*, at 720-22).

The Proceeds from the Marshal's sale of the vessel came to $245,000, *The Ozark*, at 722. This was reduced to $232,000 by wage payments and expenses (Record, Folder No. 1, document 32, Order Approving Sale; document 83, Final Decree). Subsequent disbursements for the Commissioner's fee, etc., reduced it still further. When the mortgagor defaulted in December 1959, the unpaid balance of the original debt far exceeded the proceeds in court. The controversy then is between the mortgagee and three petitioner-supplymen over a fund insufficient to satisfy all claims. Each party claims priority.

The Appellate Court found:

> ". . . that by operation of law and the intention of the parties, the 1959 Mortgage carried with it the 1958 Mortgage and the 1957 Mortgage as well . . . Until the briefs before this Court, no one either challenged the existence of the 1957 Mortgage, the 1958 Mortgage or the qualification of either as preferred mortgages under the law . . .

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"The result is that the preferred maritime mortgage has priority in payment to the maritime liens of the Suppliers." *The Ozark*, at 723-24.

Noting the simultaneous nature of the component parts of each transaction, the Circuit Court found (as did the Commissioner below) that the parties to the mortgage intended a continuation of the security (*The Ozark*, at 722-23). As a matter of law it concluded that the mortgagee was entitled to the priority stemming from the 1957 and 1958 mortgages that were on the Customs House books at the time the suppliers' liens arose (*The Ozark*, at 723-24).

The essential question is chiefly one of fact: Did the Commissioner, the District Court Judge, and the unanimous Court of Appeals err when they held that mortgagee WALL STREET's lien dated from the 1957 mortgage it took in 1958 by assignment? (where the suppliers' liens all dated from 1959). Or as Judge BROWN phrased it ". . . This turns finally on whether an earlier mortgage was extinguished so that the subsequent mortgage must be deemed an entirely new and unrelated security subsequent in point of time to existing maritime liens . . ." (at 719). The Appellate Court and the lower Court clearly found no extinguishment.

Apparently, by liberal use of the words "false" and "conceal", Petitioners seek to create a picture of their victimization by virtue of fraudulent activities. There is no support for this in the record. Indeed, neither in the prolonged period of time for hearings and submission of evidence to the Commissioner (from March through October 1960), nor in the longer period which included submissions of the numerous exhaustive briefs and memoranda to the Commissioner (Record, Folder No. 4, documents 76-82; Envelope No. 6 lists twelve additional briefs), and there-

after to the Judge (through May 1961), was any suggestion of fraud, or even misleading, raised by Petitioners.

Obviously the Court of Appeals was unimpressed with Petitioners' delayed contention. See *The Ozark,* at 721-23. The fact is that nothing approaching falseness or fraud was intimated earlier, much less proven later.

Petitioners repeatedly refer to the interest rate in an effort to indicate usury, not only ignoring proviso of 46 U. S. Code §926(d), but the significant risk factor in the industry which the law itself recognized (*The Ozark,* at 722-23). Petitioners also conveniently omit that WALL STREET reduced the original interest rate of 18% given its assignor (*The Ozark,* at 720-21, 722-23).

Petitioners complain about events which took place after their extension of credit. They never showed reliance upon the Customs House records. Not only do they "argue backwards" as Judge BROWN noted, (at 721), but their truncated version of the facts simply does not accord with the findings at each stage of the proceedings below.

ARGUMENT.

No grounds are present to merit review by this court.

Under the caption "Reasons for Granting the Writ" (p. 4), Petitioners relate nothing to accord with the requirements of Rule 19 for review by this Court.

Certainly there is no conflict between the circuits. On the contrary, there is accord on the point at issue, i.e. the continuation of the lien of the preferred ship mortgage: *The Bergen,* 64 F. 2d 877 (9 Cir. 1933), *Merchants & Marine Bank* v. *The T. E. Welles,* 289 F. 2d 188 (5 Cir. 1961). These are the only cases directly in point. The scarcity of cases in the forty-two year history of the act, scarcely argues for this being "an important question of federal law" requiring

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a ruling by this Court, cf. *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U. S. 70, 79 (1955).

The first question drafted by Petitioners starts by assuming the decidual facts of the answer it seeks, i.e., referring to Petitioners' liens as prior. The second question, on the satisfaction, avoids the factual finding of the Courts below, not only as to intent, but as to the continuing relation of the loan and security *as disclosed by the Customs House record of title.* Both questions 1 and 2 as framed by Petitioners assume Suppliers relied on the record at the time of extending their liens. Not only did they not do this, but in fact their inaction might readily have misled the Mortgagee. Their last question is founded on bold assertions unsupported by the record, not raised until the Appellate Court, and rejected on the merits.

Petitioners in their first point (at p. 4) refer to the general language of *The Northern Star*, 271 U. S. 552 (1926) as supporting them. That case held that recording of the mortgage (an uncontested point here) was a statutory necessity. But there is no question here as to validation of a mortgage. The case has no relevance to the question at issue.

Both *The Bergen* and *The T. E. Welles, supra* (the authority and propriety of which Petitioners did "not really challenge" below, *The Ozark*, at 722), held that a formal discharge of a mortgage, accompanied by a simultaneous extension or related transaction, would not work a loss of lien or priority where no such intent was shown. *The Ozark* held the same. 46 U. S. Code §925(b), cited by Petitioners (pp. 5-6) does not reach the point, nor does it purport to govern the effect of the filing. It states when and how the certificate may be filed. In this, it is no different from any comparable state statute for filing a satisfaction,

and of itself furnishes no guide, nor do Petitioners cite us to any helpful authority.

Petitioners cite (p. 5) *The Favorite,* 120 F. 2d 899, 902 (2 Cir. 1941). This case held that a mortgage, which had long since passed its maturity date, was superior to later repair liens. Both the holding and reasoning are adverse to Petitioners:

> "There can be no reason for supposing that ships' mortgages recorded in conformity with the Act of 1920, which was designed to make such securities desirable investments, should be subjected to limitations that would render their enforcement far more difficult and hazardous than that of similar mortgages covering land chattels . . ."

The Court there was echoing the basic premise of this Court in *The Thomas Barlum,* 293 U. S. 21, 39-41 (1934), for making the security offered by the preferred ship mortgages comparable to that found ashore. The Court sought to interpret the incidents of the new Preferred Ship Mortgage in a manner consistent with those governed by state law, cf. *The Bergen, supra,* at 880, *The T. E. Welles, supra,* at 193-94.

Petitioners tell us that this reference to state law threatens the uniformity sought by the Ship Mortgage Act. However, no citations are given to support their position. The reason is clear. There is no diversity in state law on the point. The state courts are in practical unanimity on the point of priority for a renewed mortgage.

> "So long as the same debt or some part of it subsists, the presumption ordinarily is that the new mortgage is intended as a renewal of the old, and the continuation of the same security." *Jones* v. *Curtiss,* 20 Wash. 2d 470, 147 P. 2d 912, 921 (S. Ct. Wash. 1944).

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> ". . . In the case at bar, the new mortgage to the extent of the old may be regarded as a mere renewal, and the amount thereof a superior lien to the lien of judgment." *Young* v. *Shaner,* 73 Iowa 555, 557, 35 N. W. 629 (1887)*

The federal courts have been in full accord; *United States* v. *Grover,* 227 Fed. 181, 184 (N. D. Calif., 1915), *American Trust Co.* v. *N. Y. Creditmen's Adjustment Bureau Inc.,* 207 F. 2d 685, 689 (2 Cir. 1953), *Potter* v. *United States,* 111 F. Supp. 585 (D. R. I. 1953). There is no dispute among the texts: 5 *Tiffany, Real Property* §§1487-88 (3d Ed. 1939), *Osborne, Mortgages* §105 (1951) *Walsh, Mortgages* §43 (1934), 41 Corpus Juris §546, 33 A. L. R. 149, 98 A. L. R. 838, 36 Am. Jur., Mortgages §§457-59. In short, there is no diversity on the mortgage law, either state or federal, on the point in question. It is, rather, an instance of outstanding agreement.

Last, Petitioners assert the decision below was not "equitable" (point 3, p. 7). Their citations are confusing, indeed bizarre. Thus *Robinson, Admiralty* §65 (p. 464) (1939) is cited as if favoring strict construction of the technicalities of the Ships Mortgage Act. In fact Professor Robinson suggested at that page that the decision discussed

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* Accord, *Higman* v. *Humes,* 127 Ala, 404, 30 So. 733, (1899), *White* v. *Stevenson,* 144 Calif. 104, 77 Pac. 828 (1904), *Holt* v. *Mitchell,* 96 Col. 412, 43 P. 2d 388 (1935), *Byrum* v. *Wise,* 216 Ind. 678, 24 N. E. 2d 1006, 1009, *rehearing den.,* 25 N. E. 2d 992 (1940), *Potwin State Bank* v. *J. B. Houston & Son Lumber Co.,* 183 Kan. 475, 327 P. 2d 1091 (1958), *Eggeman* v. *Eggeman,* 37 Mich. 436 (1877), *Gregory* v. *Thomas,* 20 Wend. 17 (S. Ct. N. Y. 1838), *Industrial Bank of Commerce* v. *Shapiro,* 276 App. Div. 370, 94 N. Y. S. 2d 437 (1950), *Gray* v. *Kappos,* 90 Utah 300, 61 P. 2d 613 (1936), *Burlington Bldg. & Loan Assn.* v. *Cummings,* 111 Vt. 447, 17 A. 2d 319 (1941), see *Shurn* v. *Wilkinson,* 131 Ark. 167, 198 S. W. 279 (1917), *Propes* v. *Todd,* 89 Ga. App. 308, 79 S. E. 2d 346 (1953), *Austin* v. *Underwood,* 37 Ill. 438 (1865), *Burns* v. *Thayer,* 101 Mass. 426 (1869), *G. M. Carleton Bros. & Co.* v. *Bowen,* 193 S. W. 732, 734, (Tex. Civ. App. 1917).

was bad precisely because it jeopardized loans secured by preferred ships mortgages. Thus the writer criticized "obvious hostility" toward mortgagees, and it was such decisions he saw as a threat to the preferred ship mortgage (*not* to supply lienors) "down to its roots."

Petitioners' argument is a repeat of the belated (as well as unsubstantiated) claim of fraud. The facts were all before the Commissioner and the Judge. Neither misleading nor misrepresentation was then alleged. Certainly it was not proved. Indeed, if there was misleading, as the Commissioner inferred (Printed Record, pp. 227-28), it was by the supply lienors against the Mortgagee. He found the equities lay in favor of mortgagee WALL STREET (Printed Record, pp. 236-37).

Petitioners did not look at the Customs House record of title. The trial record is devoid of their reliance on it. They did not trouble themselves to record their liens as permitted by 46 U. S. Code 925(a), cf. *Ocean Machinery Corp.* v. *United States,* 175 F. Supp. 288, 290, (S. D. N. Y. 1959) *The John Cadwalader,* 99 F. 2d 678, 680 (3 Cir. 1938). The Mortgagee found no supply liens of record, and received repeated assurances by covenant that the vessel was "free from any lien or encumbrance whatsoever" (Record, Envelope 1, Exhibits: 1, Preferred Mortgage, 21, Second Preferred Ship Mortgage, and 22, Supplemental Agreement; see Printed Record, 47, 97-98, listed at Commissioner's request, 98; see comment by Appellate Court, *The Ozark,* at 723).

In short, if equities are to be considered, they run strongly in favor of the Mortgagee WALL STREET.

Conclusion.

No reason is present to grant a Writ in this matter.

Respectfully submitted,

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